Supreme Court, U.S.
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No. 95-849

In The

Supreme Court of the United States
October Term, 1995

JOYCE H. CRANDON,

Petitioner,

vs.

FRANKIE D. DUNNICK,
Commissioner of the Kansas Banking Commission,
Individually,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

The first two questions presented by Petitioner's brief are more accurately stated as: Did the Kansas Supreme Court follow United States Supreme Court precedent when it upheld the termination of the State Bank Commissioner's general counsel?

The third question presented requires construction of state law (K.S.A. 60-256) and is not properly a matter for certiorari to this Court under jurisdictional rules. S. Ct. R. 10.

LIST OF ALL PARTIES

JOYCE H. CRANDON, Appellant

THE STATE OF KANSAS for and on behalf of the KANSAS BANKING COMMISSION, and FRANKIE D. DUNNICK, as Commissioner of the Kansas Banking Commission, and individually, Appellees.

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CITATION OF OPINION BELOW

The Memorandum Opinion and Entry of Judgment, signed by the Hon. Franklin R. Theis on December 27, 1993 in Case No. 92-CV-1273, in the District Court of Shawnee County, Kansas, is attached as an Appendix to Respondent's Brief.

JURISDICTIONAL STATEMENT

The statutory authority Petitioner cites for her jurisdictional basis, 28 U.S.C. § 1257(3), was repealed in 1988. Even under the existing § 1257, Petitioner cannot claim a jurisdictional basis; no federal statute is called into question in the case on which Writ of Certiorari is sought, nor is any state statute questioned as being contrary to federal laws or the Constitution.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. ADDITIONAL MATERIAL FACTS

Petitioner was employed as General Counsel to Commissioner Frankie D. Dunnick, the State Banking Commissioner. As general counsel, Petitioner gave legal advice to Commissioner Dunnick, whose job it was to execute banking laws in Kansas and examine and regulate state banks (Appendix, pp. A-7, A-8; Petitioner's Appendix, p. 3). Before she would testify at her deposition, Petitioner required the Bank Commissioner to waive the attorney-client privilege.

When Petitioner contacted the FDIC about a Deputy Bank Commissioner's alleged violations of law, the FDIC attorney stated he would turn the matter over to the Department of Justice and the Office of the Comptroller for investigation (Appellant's brief, p. 8).

Petitioner described her communication with the FDIC as "reporting" that the Deputy Commissioner had two loans at state

chartered banks (Appendix, p. A-4; Petitioner's Appendix, p. 11). Petitioner's petition and deposition testimony describe her phone calls to the FDIC and advice to a state bank examiner as "reporting." (Appendix, p. A-4; Petitioner's Appendix, p. 14).

No evidence exists that the Deputy Commissioner examined or interfered with the examinations of the two banks which held her loans, i.e. The Baileyville State Bank and Southwest Bank & Trust (Petitioner's Appendix, p. 10).

The Deputy Commissioner did not violate any federal or state banking laws (Petitioner's Appendix, p. 22), and Petitioner took no steps to investigate the facts which would have shown a reasonable attorney that the Deputy Commissioner could not have violated banking laws, including 18 U.S.C. § 213 (Petitioner's Appendix, pp. 20, 22).

Petitioner never discussed her belief that the Deputy Commissioner had violated banking laws with either Commissioner Dunnick, who had the authority to act on any violations, or with Deputy Commissioner Stork (Petitioner's Appendix, p. 17).

The only comment Commissioner Dunnick or the Deputy Commissioner heard Petitioner make about the "reported" violations was during cross-examination at an administrative hearing, when Petitioner elicited testimony, then argued, that the Deputy Commissioner had violated no banking laws (Petitioner's Appendix pp. 7, 9 and 19).

Petitioner embarrassed Commissioner Dunnick by taking her legal opinions to outside federal agencies, rather than to him (Petitioner's Appendix, p. 12); no exigency existed which required Petitioner to avoid giving advice to her clients before reporting to outside officials (Petitioner's Appendix, p. 12).

Commissioner Dunnick and his staff stated that they had lost confidence in Petitioner at the time of her termination (Appellee's Brief, p. 5).

II. MISSTATEMENTS OF FACT

Petitioner refers to her communications with the FDIC as "inquiries." Although the legal effect is the same, see below, Pe-

titioner's testimony, the petition and lower court holdings classified the communications as "reporting" (Petitioner's Appendix, p. 11, 14; Appendix, p. A-4).

Contrary to Petitioner's statement on page 13, pertinent portions of the Emery transcript were part of the record on appeal. (Appendix, p. A-14; Petitioner's Appendix, p. 7, 9).

Contrary to Petitioner's statement on pages 15 and 16, there is no evidence that Commissioner Dunnick "lied" about any matters at the Emery hearing; no such allegation was ever made prior to the petition for certiorari.

Contrary to Petitioner's statement on page 19, her job was not to give advice to examiners concerning matters dealing with the administration and violation of banking laws, Petitioner's job was to give advice to Commissioner Dunnick, the only official with authority to act (Petitioner's Appendix, pp. 9, 11).

Contrary to Petitioner's statement on page 20, Petitioner has no information or evidence that the Deputy Commissioner examined Southwest Bank & Trust (Petitioner's Appendix, pp. 16, 21-22).

ARGUMENT

I. SUMMARY OF THE ARGUMENT

The Kansas Supreme Court used the factors set out by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), and *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983), to determine that Petitioner's first amendment right to public comment was outweighed by Commissioner Dunnick's interest in the effective operation of his agency. The Court found that Petitioner's actions in speaking to an outside federal agency about the Deputy Commissioner's alleged criminal violations, without properly investigating the facts or following the law, and without discussing the matter with Commissioner Dunnick, who had the authority to act on any such violations, destroyed her effectiveness as his counsel. Petitioner's repeated breach of her duties as the agency attorney signif-

icantly disrupted the future relationship and trust between her, as general counsel, and Commissioner Dunnick, as agency head. Because a close working relationship and trust are vital to the relationship between counsel and Commissioner, the destruction of this relationship tipped the *Pickering* balance in the government's favor.

II. ARGUMENT AND AUTHORITIES

Commissioner Frank Dunnick hired Petitioner in late 1991 to act as general counsel for the State Bank Commissioner. Petitioner provided legal advice to the Commissioner in his administration of state banking laws and regulation of state banks. The Commissioner's second-in-command was Judi Stork, his Deputy Commissioner. In mid-1992, a review examiner brought to Petitioner's attention the fact that Stork or her husband had loans at two state banks. Petitioner performed a cursory review of the facts underlying the loans. Petitioner believed 18 U.S.C. § 213 was violated, a federal criminal statute which stated, and was construed to require, an "examiner" who "examines" a bank at which she has a loan. Without these two elements, no violation exists. *U.S. v. Napier*, 861 F.2d 547 (9th Cir. 1988). State banking laws also required banks to be examined by individuals with loans before a violation was found. The Deputy Commissioner had not examined either bank brought to Petitioner's attention.

Over the course of the summer of 1992, Petitioner made two phone calls to Gerald Lamberti, attorney for the FDIC. Petitioner relayed to him that a Deputy Commissioner of her agency illegally had loans at two state banks. Lamberti stated he would pass the information along to the Department of Justice and Office of the Comptroller. At no time did Petitioner talk to the Deputy Commissioner to verify her second-hand facts and assumptions; Petitioner never talked to Commissioner Dunnick to advise him she believed state and federal banking laws were being violated by his Deputy. In fact, at a civil service hearing shortly before her termination, Petitioner elicited Stork's testimony and made vigorous arguments to the administrative panel that Stork's state loans did

not violate any laws. Also shortly before her termination, Petitioner advised the review examiner to report the matter of Stork's loans to the FDIC for action.

Through an official for the FDIC, Commissioner Dunnick learned that Petitioner and the review examiner she advised had reported the Deputy Commissioner to the FDIC. Commissioner Dunnick was furious with Petitioner for taking her legal opinions outside his agency without his knowledge; he was also embarrassed that outside agencies had information, through his agency attorney, that he did not have. The Court found there would be a detrimental impact on all future Commissioner-counsel relations. Commissioner Dunnick terminated Petitioner's employment as his general counsel.

Both the state district court and the Kansas Supreme Court found that Commissioner Dunnick was justified in losing his trust and confidence in his general counsel. The Model Rules of Professional Conduct, which Kansas has adopted, prescribe the steps Petitioner should have taken when the review examiner discussed the Stork loans with her. Petitioner should have performed an independent investigation of the facts to determine whether Stork had examined either of the banks holding her loans. Petitioner should have researched the annotations to state and federal banking laws and determined if the facts supported a violation of the laws. If Petitioner then concluded a violation had been committed, the lower courts held, she should have informed Commissioner Dunnick about the matter and advised him how to proceed in enforcing the banking laws. None of the foregoing actions was taken, held the lower courts, in derogation to Petitioner's duty as an attorney and as agency general counsel. Moreover, Petitioner should never have represented to an administrative tribunal that Stork violated no laws when Petitioner was apparently convinced of Stork's violations. The Kansas Supreme Court held Petitioner's failure to take appropriate steps for the protection and guidance of her agency and client caused Commissioner Dunnick to lose confidence in her abilities and trust in her judgment.

The appropriate starting point to determine whether an employee's first amendment rights have been wrongfully denied is the *Pickering* case; accordingly, the Kansas Supreme Court began with *Pickering* factors to gauge the parties' competing interests. The *Pickering* holding is specifically directed toward employees who have interests similar to any "citizen's" (391 U.S. at 568, 20 L.Ed.2d at 817), whose statements are not directed toward anyone with whom he would be in daily contact (391 U.S. at 569-570, 20 L.Ed.2d at 818), and whose relationship with his superiors is in no way confidential or of such a personal and intimate nature that the employee's public criticism would undermine the effectiveness of the working relationship (Id., fn. 3). *Pickering* is also distinguished from the situation in which the employee ". . . carelessly made false statements about matters so closely related to day-to-day operations . . . that any harmful impact on the public would be difficult to counter because of the [employee's] presumed greater access to the real facts." 391 U.S. at 572, 20 L.Ed 2d at 819. This Court's conclusion in *Pickering* was that the government's interest in effective and efficient fulfillment of its responsibilities to the public was subordinate to the employee's interest in voicing his opinion. Every element of Petitioner's scenario is distinguishable from Marvin Pickering's.

Petitioner did not have simply a "citizen's" interest in speaking out; as general counsel she had access to highly confidential, unformed opinions and material. Her apparent access to such materials gave her comments greater weight and validity. Petitioner's breach of the Commissioner's trust and confidence, based on the nature of her position, had much more serious effects on the agency, as the lower courts found; for instance, the Commissioner's future reluctance to seek advice from counsel he does not trust leaves the agency to operate in a legal void. Petitioner was the "personal and intimate" employee which *Pickering* footnote number three describes, and which the Kansas Supreme Court recognized as having the ability to undermine any effective relationship with the Bank Commissioner.

Petitioner argues that she was merely making "inquiries" to the FDIC (despite her own testimony and the FDIC attorney's statement to her that the matter would be passed onto a prosecutorial body). Terming communications inquiries, rather than reports, does not relieve Petitioner of the responsibility for destroying her relationship with Commissioner Dunnick. Connick, too, was merely making inquiries through her in-house questionnaire. The Court found that these "questions, no less than forcefully stated opinions, carry messages" and the messages carry "the clear potential for undermining office relations." (461 U.S. at 152, 75 L.Ed 2d at 723). Additionally,this Court recognized in *Connick* that close working relationships between attorneys and their superiors are necessary for the "efficient and successful" operation of the office (461 U.S. at 151, 75 L. Ed. 2d at 723); thus, the employer in *Connick* was accorded a wide degree of deference in his employment decisions. *Id.* Contrary to Petitioner's position, this Court rejected a showing of "actual disruption" in favor of the employer's reasonable belief that potential disruption and destruction of office relationships would result from the employee's question. 461 U.S. at 152, 75 L.Ed 2d at 723.

The Kansas Supreme Court followed *Connick* and found the requisite close working relationship between Commissioner Dunnick and his counsel. The Court found clear potential for disruption where the Commissioner relied on Petitioner for his legal advice and guidance, and Petitioner breached her responsibility to "give advice when necessary to rectify or prevent unlawful or improper acts of the organization and its employees." Petitioner's Appendix, p. 20. The Court afforded the Commissioner deference in his decision to act where the close working relationship and need for trust in his counsel would be disrupted. In fact, evidence of *actual* disruption and lack of trust were present in the Commissioner's statements that he had lost confidence in his counsel and in his anger at her betrayal of her duties to the agency. *Connick* requires no further proof to tip the balance toward the government.

Rankin v. McPherson, 483 U.S. 378, 388, 97 L.Ed. 2d 315, 327, 107 S.Ct. 2891 (1987), restates the government's interest that

statements not impair discipline by superiors, that statements not have a detrimental impact on close working relationships when personal loyalty and confidence are necessary, that statements not impede the employee's performance of her duties and that statements not interfere with the regular operation of the agency. Under these criteria as well, Petitioner's careless disclosures to an outside agency, without her client's knowledge, undermined the agency's ability to fulfill its functions in all future matters needing legal advice. The Kansas Supreme Court so recognized.

Petitioner cannot find solace in *Waters v. Churchill*, 511 U.S. ___, 128 L.Ed. 2d 686, 114 S.Ct. ___ (1994). The opinion is a plurality and, therefore, has no precedential value. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L. Ed 2d 250 (1977), citing, *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15, 49 L.Ed 2d 859, 96 S.Ct. 2909 (1976). Moreover, *Waters'* only variation from *Pickering* and *Connick* does not apply to Crandon; that is, if there is a dispute between the employer and the employee as to the content of the speech the employer must take certain steps. For purposes of summary judgment and appeal, Commissioner Dunnick conceded to Petitioner's version of her speech throughout the lower court proceedings. Again, the Kansas Supreme Court followed applicable precedent; it recognized the protected nature of Crandon's speech, but, when balanced against the potential and reality of harm to the agency caused by her speech, her first amendment protection was found to be subordinate to the agency's interest in performing its public duties.

Petitioner's last question asks this Court to reconsider the Kansas Courts' application of the state standard for summary judgment, K.S.A. 60-256. This Court has no jurisdiction over such matters of state procedural law.

CONCLUSION

The lower courts in this case carefully followed the guidelines of *Pickering* and *Connick* in weighing the government's interest against Petitioner's. There is no statute or federal law at issue in this case; there is no finding or holding contrary to Supreme Court

precedent. This Court has no jurisdictional basis for granting petitioner's writ of certiorari. Respondents urge the petition be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

DIVISION SEVEN

JOYCE H. CRANDON, Plaintiff,	)	
vs.	)	
	)	Case No. 92 CV 1273
THE STATE OF KANSAS, for and on behalf of the KANSAS BANKING COMMISSION, and FRANKIE D. DUNNICK, as Commissioner, and individually, Defendants.	)	

MEMORANDUM OPINION AND ENTRY OF JUDGMENT ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Nature of the Case/Findings of Fact:

This is an action brought by the plaintiff, Joyce H. Crandon, claimed arising as a result of her termination as general counsel for the Office of the State Bank Commissioner, a state agency consisting of the State Banking Board and the State Bank Commissioner, by the action of Frankie D. Dunnick, the State Bank Commissioner.

Plaintiff asserts in her petition, including her proposed amended petition, four separate causes of action upon which she claims a basis for recovery against the above captioned defendants. These causes of action include a claim against the defendants for violation of 42 U.S.C. 1983 claiming her termination was a result of her exercise of "speech" protected under the First Amendment to the United States Constitution. The other three causes of action alleged claim she was terminated in retaliation for her "whistle-

blowing" against the agency or its personnel either under the common law cause of action recognized by the Kansas Supreme Court in *Palmer v. Brown*, 242 Kan. 893 (1988) or in *Larson v. Ruskowitz*, 252 Kan. 93 (1993) or the statutory cause of action established in favor of state unclassified employee "whistleblowers" by K.S.A. 75-2973(g).

There is a dispute of fact between the parties and the dispute of fact could be, subject to predicate facts, one central to plaintiff's recovery under any cause of action pled, that is, "but for" plaintiff's alleged act(s) of communication(s) would she have been terminated by her employer. Central to this issue would be the credibility of the evidence as to what was said to her, and meant, by Commissioner Frankie D. Dunnick at a meeting shortly precedent to her termination. Accordingly, for the purpose of the pendant motion, the court must assume the plaintiff's recitation of, and the meaning ascribed to, the pretermination event is correct.

A second central point of fact subject of dispute, but closely interwined with the aforementioned factual dispute, is whether, in fact, Commissioner Dunnick was aware of the communication Ms. Crandon alleges as the basis for her termination. Nevertheless, for the purpose of the present motion it is assumed Mr. Dunnick knew of the communications.

The record reveals the following facts claimed by plaintiff to define her claim:

"Q. What was the matter of public concern that you either talked to Eric about or talked to Gerry Lamberti about?

A. The Stork loans.

Q. The car loan and the home loan?

A. Yes, examiner loans.

Q. And why did you feel those were a matter of public concern?

A. All you have to do is read in the newspaper every single day and you can see about the RTC, about the failed saving and loans, about the failed banks. There was an article in the newspaper that said 25 percent of the loans were insider type loans that were

problems with all these failed S&L's. You just have to pick up the newspaper. You don't have to be a rocket scientist to find that out.

Q. Did you have any information that these loans were problem loans?

A. No, I do not.

Q. Did you think they were not supported by adequate financial statement?

A. I didn't make an opinion of that. I thought they were in in violation of the law. I mean that isn't what the laws says. The law says that examiners shouldn't belong to state—have loans to state chartered banks.

Q. And the examiner that you're talking about is Judi Stork?

A. That's right.

Q. Let me ask you one more time because I am still a little confused. The matter, the matter of public concern was the loans because there are troubles with insider loans or because—

A. Because they're a violation of the law.

Q. Okay.

A. The law says examiners are not to have loans at banks.

Q. 18 U.S.C. 213?

A. That's correct.

Q. An in —

A. As far as that's concerned, I think it's a public concern for the state, state laws and the state ethics policy. If we have a state ethics policy, and there is no, you know, there is no one to enforce it and it's not enforced within the department, I think it should be reported to somebody who has some authority to do something about it, and the FDIC is a co-regulator and does joint exams or alternate exams.

Q. On Paragraph 35, the petition says plaintiff reported a matter involving public concern, and again, the matter that you're reporting is the two—the car loan and the home loan that Rob Stork took out?

A. Yes, the Stork loans, and I think at some time there was questions. There was inquiries about overdrafts and if overdrafts

were in fact loans, regulations on that overdraft side of loans, what definition of an extension of credit is.

Q. Are you saying now that your termination was caused by reporting overdrafts as well as loans?

A. Inquiries, I had inquiries because that's where I got that—Lamberti gave me the cite on the regulation and it was just strictly what the definition of an extension of credit was and that's in my memorandum.

Q. Is that what you call reporting is you ask Lamberti about a law and he gives you a citation or a law, that's reporting facts?

A. I made inquiries about—inquiries.

Q. Inquiries?

A. That's what he called them were inquiries.

Q. And you agree with that?

A. I— reporting and inquiries, yeah.

Q. What was the difference, what was the reporting?

A. Oh, the whole conservation. I can't dissect it because I don't have a transcript of the conversation. I don't have a tape recording of the conversation.

Q. What portions of the conversation by you constituted reporting?

A. Well, I think when you identify somebody as a Deputy Commissioner who has two different state chartered banks, which, you know, that possibly could be constituted as reporting.

Q. But you said you were just calling up to ask questions about specific facts? You were inquiring as to what the state of the law was?

A. That's correct, but I was also giving information. I was giving facts, a lot of facts.

Q. You were giving Gerry Lamberti information?

A. I was giving him facts.

Q. And that's what you mean by reporting the context of Paragraph 35 and 34?

A. Yes, those two, those two phone conversations with Gerry Lamberti and then my advice to Eric when we found out about

Marilyn's conversation with bank examiner, I, I told Eric to turn it over to the FDIC.

Q. Did you ever tell anyone inside the Bank Commissioner's office that you had advised Eric to turning over to the FDIC?

A. No, I did not.

Q. Did you ever tell anyone outside the Bank Department other than an attorney that you advised Eric to turning over to the FDIC?

A. No, I did not.

Q. I, I said ever. I mean prior to your termination?

A. No, not that I can recall.

Q. Paragraph 36 says the defendants terminated the plaintiff in retaliation for exercising her right of free speech. What facts support that allegation?

A. Just what I've just reported, just what I just told you.

Q. On what facts do you base the statement that your termination was in retaliation?

A. The Commissioner told me so, the Commissioner's own words and the timing.

Q. What words by the Commissioner?

A. The Commissioner said I want you to know that nobody goes over my head to the FDIC. It makes me look like I don't know what's going on. I know you've been talking to Eric and that little boy is going to find out who is in charge around here. I am not through with him. That little boy is going to find out who is in charge around here, and those are— I've already turned those minutes over. I've got verbatim what he said because I made notes of it and you've got records of that.

Q. The commissioner's words and the timing?

A. Mm-hmm.

Q. The timing of what?

A. The timing of my dismissal, I was fired on the 13th. I told Eric to turn this over I think it was on the 7th or the 8th, which was on a Tuesday or a Wednesday before I got fired on Monday. The Commissioner called—I know the Commissioner talked to Pritchett and to Baileyville people on Thursday before I got fired.

It's in the minutes. He admitted that in his interrogatories, and I know that the Commissioner had a conversation with Eric and with, with Eric and with George Myers who was the supervisor of the Topeka crew on Friday before I was dismissed on Monday.

MS. ULRICH: Do we need to stop here for a minute?

(Off the record)

Q. (By Ms. Ulrich) What does the Commissioner's conversation with Ray Pritchett have to do with your termination?

A. Pritchett told—Dunnick told me that Pritchett told him that there was an investigation going on. I've got it more clearly in my notes.

Q. Did your name come up in Pritchett's conversation?

A. Dunnick told me he did—I mean he didn't tell me my name came up, but he said I know you've been talking to Eric. Dunnick told me, he says I know you've been talking to Eric and Pritchett had told him—Dunnick told me that Pritchett told him that there was an investigation going on into the Stork loans.

Q. Did your name come up in the conversation between the two of them?

A. The Commissioner told me that Pritchett had told him that—this is what the Commissioner told me when he fired me.

Q. I just asked you a question as to whether your name came up. Did he say your name came up in the conversation between him and Pritchett?

A. He said I know you've been talking to Eric, and I want you to know nobody goes over my head to the FDIC. Makes me look like —

Q. Your answer is no?

A. My answer is not no. My answer is just what I said.

Q. Your name either did come up or it didn't come up.

A. I don't know. He told me he knew I had been talking to Eric, nobody was going over his head to the FDIC. And I think in my notes there is something to the effect that Eric did not have the authority to go over his head or something like that to the FDIC."

(Plaintiff's Exhibit C, Deposition of Joyce Crandon, at pages 373 beginning at line 2, 374, 375, 376, 378, 379, 380, and 381 ending with line 24.

No other facts *material* to the issues presented by the defendants' motion for summary judgment are in dispute.

Conclusions of Law:

The court is of the view that even assuming the disputed facts in plaintiff's favor, the remaining materially undisputed threshold facts require that summary judgment be entered in favor of the defendants and plaintiff's petition be involuntarily dismissed on all claims as to all defendants.

Central and to the legal heart of each claim of plaintiff is the necessity of resolving one question, that is, whether each alleged communication itself under the circumstances and conditions under which it was made and based on the record as a whole was legally protected such as to insulate plaintiff from termination for the mere act of communication. This, or undisputed facts, is question of law for the court under *any* claimed cause of action.

The further undisputed facts reveal the following.

Ms. Crandon carried the title of general counsel to the office of the state bank commissioner and had the status of an assistant attorney general. She began upon her duties on November 18, 1991. Her position was in the unclassified civil service. See, K.S.A. 75-3135; K.S.A. 75-2935(l)(j) and (m). As such, she had no tenure and was an "at will" employee. Compare, *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 716-719 (1988), pet. rev. den., 243 Kan. 780 (1988).

The State Banking Board is a state agency whose function it is to advise on the regulation and examination of state chartered banks by the office of the state bank commissioner. It has other duties separate from the powers of the state bank commissioner. See, K.S.A. 74-3004; K.S.A. 9-1801 et seq. It also acts as an appellate body concerning some decisions made by the state bank commissioner. See, K.S.A. 9-1714, 1716, 1804. The Board also has authority to remove a bank officer or director for violating banking

laws (See, K.S.A. 9-1805). Otherwise, the banking board acts independently in approving certificates of authority to operate banks (K.S.A. 9-1801), controls the change of location of banks (K.S.A. 9-1802), and acts on branch banking applications (See, K.S.A. 9-111b). Otherwise, it is the state bank commissioner who has the principal authority under K.S.A. 9-1701 et seq. to execute the laws and to examine and regulate banks.

The Board itself consists of nine members appointed by the governor and confirmed by the State Senate. See, K.S.A. 74-3004. The state bank commissioner is appointed by the governor and confirmed by the State Senate. It is the bank commissioner's duty to administer the state's banking laws. The state bank commissioner holds office for a term of four years. See, K.S.A. 75-1304. Further authorized is a deputy commissioner appointed by the commissioner. The Deputy Commissioner is in the unclassified civil service and enjoys no tenure, but serves at the pleasure of the state bank commissioner. See, K.S.A. 75-3135.

The remaining staff of the agency, exclusive of clerical personnel, consists of individuals holding office and authority as "examiners" whose duties involve actual performance of, or supervision of, examinations of state chartered banks. All these personnel, as well as clerical staff, hold positions in the state classified civil service system, meaning they are not subject to dismissal without cause. See, K.S.A. 75-3135; 75-2935(2).

It was the duty of Ms. Crandon to act as the legal advisor to, and attorney for, this agency. Beginning approximately April to May 1992, one of the review examiners, Erik Berggren, became aware that the Deputy Commissioner, Judi Stork, who had held appointment in the agency since 1981, first as an examiner and subsequently, at the time in question, in the position of deputy commissioner, could be considered to have existing loans from two state chartered banks, the State Bank of Baileyville, also a bank in which her financial disclosure statement filed pursuant to K.S.A. 46-247 et seq. disclosed she had a "substantial interest", and from the Southwest Bank and Trust in Topeka. (See, Defendants' Exhibit A, Deposition of Erik Berggren, pages 28, 29, 34, 35, 38.)

One loan from the State Bank of Baileyville consisted of a note signed only by her husband, but the resulting mortgage on her home was signed by both she and her husband. Other loans consisted of a series of overdrafts on a personal checking account she held with that bank. Another loan existed at the Southwest Bank and Trust upon which, although Mrs. Stork was not a signatory to the loan documents, the collateral, a car, was titled in the name of she and her husband, he being the sole signator on the loan. For the purposes here it is not necessary for the court to determine whether, in fact, Mrs. Stork was a loan recipient in each circumstance, however, for the purpose of defendants' motion the court shall presume in each instance she was a loan recipient. See, Defendants' Exhibit B, attachments: mortgage, vehicle registration.

In any manner, Mr. Berggren believed that such loans placed Mrs. Stork not only in violation of the agency's own internal written ethics code (See, Defendants' Exhibit B, "Department Policy Memorandum" of June 22, 1989), but also constituted a violation of state and federal banking laws.

In this regard, K.S.A. 9-1701(a) provides:

> *"The commissioner or the commissioner's assistant or examiners shall visit each bank and trust company at least once every 18 months, and may visit any bank or trust company if the commissioner deems it necessary, for the purpose of making a full and careful examination and inquiry into the condition of the affairs of such bank* or trust company. For such purpose the commissioner, the commissioner's assistant and examiners are authorized to administer oaths and to examine under oath the directors, officers, employees and agents of any bank or trust company. Such examination shall be reduced to writing by the person making it and such person's reports shall contain a full, true and careful statement of the condition of such bank or trust company. The commissioner in lieu of making a direct examination and

inquiry may accept the examination and report of an authorized federal agency. The commissioner shall provide to the board of directors of the bank or trust company a copy of the examination report written by the state examiners. *Neither the commissioner, the commissioner's assistant nor any examiner shall examine any bank or trust company in which the person making such examination is a stockholder or is otherwise financially interested or to which bank or trust company or any officer thereof the person making the examination is indebted.*" (Emphasis supplied.)

Also noted is 18 U.S.C. 213 which provides:

"Whoever, being an *examiner or assistant examiner* of member bank of the Federal Reserve System, financial institutions the deposits of which are insured by the Federal Deposit Insurance Corporation, which are branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 USCS Sec. 3101(1), (3)]), or which are organizations operating under section 25 or section 25(a) of the Federal Reserve Act, or a farm credit examiner or examiner of National Agricultural Credit Corporations, or an examiner of small business investment companies, accepts a loan or gratuity from any bank, branch, agency, corporation, association or organization *examined by him* or from any person connected therewith, shall be fined not more than $5,000 or imprisoned not more than one year, or both; any may be fined a further sum equal to the money so loaned or gratuity given, and shall be disqualified from holding office as such examiner." (Emphasis supplied).

Further, to be noted, as it will be addressed subsequent, is 12 U.S.C. 1289, as amended, as here relevant:

> "(a) Prohibition
>
> (1) In general
>
> Except with the prior written consent of the Corporation—
>
> (A) any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not—
>
> (i) become, or continue as, an institution-affiliated party with respect to any insured depository institution;
>
> (ii) own or control, directly or indirectly, any insured depository institution; or
>
> (iii) otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution;"

Further, in reference to the above statute, the phrase "institution affiliated party" is defined in 12 U.S.C. 1813(u), as here relevant as follows:

> "(1) any director, officer employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;
>
> . . .
>
> (3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution;
>
> . . ."

Subsequent, probably in April to May or June 1992, Mr. Berggren first brought his concerns to Ms. Crandon's attention (See, Defendants' Exhibit A, page 38; plaintiff's affidavit of September 1, 1993). Further, this underlying factual situation concerning Mrs. Stork became a part of a civil service hearing in a termination proceeding initiated by the Commissioner regarding an employee (not related to this case) that had been appealed by the employee examiner to the state civil service board at which Ms. Crandon appeared in defense of the agency action. The employee had been terminated based on her conviction for violating 18 U.S.C. 213. The issue at note arose from an apparent "what's good for the goose is good for the gander" defense claiming that Mrs. Stork had loans with state chartered banks and she was not terminated. The terminated employee was reinstated by the civil service board. This hearing was on July 6, 1992. Ms. Crandon had argued before the Kansas civil service board that Mrs. Stork was not in violation of any such laws and the circumstances were not comparable. The Board's reasoning for its decision to reinstate the employee does not support any finding, conclusion, or reasoning by any reference to Mrs. Stork's circumstance. See, "Defendants' Reply to Plaintiff's Response", Exhibit C.

Mrs. Stork's circumstance was also raised by state bank examiners as a part of the regular examination of the State Bank of Baileyville on going circa this same period. (Defendants' Exhibit A, id.; Plaintiff's 11/8/93 "Supplemental Response", Exhibit "Berggren" notes.) At one point in June 1992, and again the week of July 6, 1992, Ms. Crandon made, on each occasion, a phone inquiry to the Federal Deposit Insurance Corporation regional office in Kansas City, specifically, to Mr. Lamberti, its regional counsel, whether in his view Mrs. Stork's circumstances were in violation of federal law, specifically 18 U.S.C. 213. (See, Plaintiff's Exhibit C, supra, at page 374-376, 378.) Mr. Lamberti subsequently has testified that he did not perceive a violation, but that such an issue was an internal one for the state agency. Admittedly, he said his response was ad hoc and without research. Notwithstanding, in considering defendants' motion the court will consider Mr. Lamberti's re-

sponse as sufficiently ambivalent such that plaintiff might believe his response at least left a question raised as to the violation of federal law. (See, Defendants' Exhibit H and Plaintiff's "Supplemental Response" of 11/8/93; Deposition of G. Lamberti"; Defendants' Exhibit B, deposition of plaintiff, pages 233-234, 240.)

Sometime during the week of July 6, 1992, Ms. Crandon advised Mr. Berggren to turn the matter over to the FDIC, which he did. Mr. Berggren has testified he would have done so in any manner notwithstanding any advice of Ms. Crandon. (See, Defendants' Exhibit A, page 110; Defendants' Exhibit B, page 229).

Subsequently, and for the purpose of the motion and taken as true, Commissioner Dunnick learned at a meeting with the FDIC on July 9, 1992, of Mr. Berggren's reporting to the FDIC, Ms. Crandon's advice to him to do so, and her inquiries to Mr. Lamberti.

At no time prior to her termination, except during questioning at the civil service hearing on July 6, 1992, when Mrs. Stork and Mr. Dunnick were called as witnesses, had Ms. Crandon personally talked with Mr. Dunnick or Mrs. Stork about Mrs. Stork's status vis a vis the identified loans and whether Mrs. Stork's loan circumstances violated federal or state banking laws, state ethics statutes, or internal agency ethics policy (Defendants' Exhibit B, pages 241, 263; Defendants' Statements of Fact 29; Plaintiff's Response Memorandum, Fact 29.)

At no time prior to Ms. Crandon's termination did Ms. Crandon, attempt, in any manner, to persude Mr. Dunnick, as the agency's head, that he should affirmatively act in some fashion under his authority as Commissioner to remedy the situation she believed was presented arising from the fact of Mrs. Stork's loans (id.).

Ms. Crandon asserted through counsel at oral argument in this case that she made one phone call to the attorney general's office and was told they don't give opinions on criminal matters. The person called is not identified.

There is no evidence Ms. Crandon contacted any member of the banking board or the Governor's office before her termination.

For the purpose of the motion, it is assumed Mr. Berggren told Ms. Crandon that he had discussed the loans with Mrs. Stork and that he had brought them to the attention of Commssioner Dunnick who said he would look into it (See, Defendants' Exhibit A, page 97). The conversations between Berggren, Stork, and Dunnick probably occurred prior to May 27, 1992. (See, Defendants' Exhibit D, Document 200337; Defendants' Exhibit A, pages 35, 38.)

Whether Ms. Crandon knew Mrs. Stork had told Mr. Berggren she had never had authority to examine the State Bank of Baileyville since she first came to the agency or that Mrs. Stork had closed her checking account at the State Bank of Baileyville is unclear. (Defendants' Exhibit B, page 229.) However, she did not know that Mrs. Stork had replied to the inquiries by memo to the commissioner. (Defendants' Exhibit B, page 263.) Notwithstanding, these facts could have been confirmed by agency documents or official inquiry to the bank. See, Defendants' Exhibit D, Documents 200337, 200338, 200339, 200340. Ms. Crandon did not see these documents and the response of Mrs. Stork to inquiries posed to her as to her authority to examine the State Bank of Baileyville when she was a witness, under oath, in the Emery civil service hearing were that she had no such authority. (Defendants' Exhibit B, page 263, 305-306.) Ms. Crandon knew from Mr. Berggren that Commissioner Dunnick had reviewed the matter by June 1, 1992, and had concluded Mrs. Stork's situation violated no state policy, but she did not know the basis for his decision except for what she may have learned at the civil service hearing. (See, Defendants' Exhibit A, page 35; Defendants' Exhibit B, pages 229, 263.)

Further, no evidence has been proffered by the plaintiff that she had *any* other source of *factual* information to form any opinion that Mrs. Stork's loans were in violation of any law or policy other than by talking to Mr. Berggren or to Mr. Lamberti, except to confirm by inspection at the Record of Deed's office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. and Mrs. Stork's name and to confirm title to the motor vehicle subject of the loan and lien of Southwest

Bank and Trust was likewise in their names. Plaintiff is unable to say what, if any, case law she reviewed prior to any advice to Mr. Berggren or used in the formulation of any opinion of wrongdoing other than *St. Francis Hospital v. Browles*, 251 Kan. 334 (1992), which explains the doctrine of necessaries vis a vis one's spouse's liability for the debts incurred by the other. The statutes or regulations upon which she stated she relied were K.S.A. 9-1701, 12 U.S.C. 213, 12 U.S.C. 1289, and 12 C.F.R., part 215.

Plaintiff proffers no evidence existing at the time of her report to support her assertion that Mrs. Stork had unlawfully examined the Southwest Bank and Trust (See, Defendants' Exhibit B, page 260) or interfered with the examination of the State Bank of Baileyville. (See, Defendants' Exhibit B, page 225-226; Defendants' Exhibit C, page 323, 325-326.) Ms. Crandon did state she believed Mrs. Stork had authority to examine *any* Kansas Bank. (See, Defendants' Exhibit B, pages 253-255). Ms. Crandon states she investigated whether Mrs. Stork was in violation of 12 U.S.C. 1289 by examining Case 82 CR 234 in the Shawnee County District Court and Mrs. Stork's disclosure of substantial interest statements filed with the Secretary of State, but did not discuss with anyone, but Mr. Berggren, whether Mrs. Stork's prior diversion agreement placed her in violation of federal law because she had an ownership interest in the bank. She undertook no other investigation nor inquiry. (See, 12 U.S.C. 1289; 82 CR 234, District Court of Shawnee County; See, Defendants' Exhibit B, pages 271, 273). There is no evidence the subject matter of her 12 U.S.C. 1289 inquiry was part of any "whistleblowing" claim (See, Defendants' Exhibit B, pages 231, 271) or that Mr. Dunnick knew of it, however, it is accepted by the court as advanced as one motivation by Ms. Crandon for her "reporting" activity and procedure. Of course, factual information arising after her "reporting" would not be a proper standard to test the reasonableness of her belief at the time of reporting.

It seems substantially clear and not reasonably subject to material dispute what Ms. Crandon's "whistleblowing" and/or "free speech/public concern" communication claim is alleged to be. It consists of up to two inquiries to Mr. Lamberti of the FDIC con-

cerning loans made to a spouse of what Ms. Crandon represented was a deputy commissioner or "supervisory examiner" and, for the purpose of this matter, further inquiries and reporting of the circumstances concerning such loans to the FDIC by Erik Berggren which, though encouraged by Ms. Crandon, Mr. Berggren would have proceeded on in such manner in any fashion.

The plaintiff's claim is that she was terminated by her employer, the state bank commissioner, for this collective "reporting" to the FDIC.

Certainly, the violation of state or federal banking or ethics laws is of public concern and, specifically, the violation of federal banking laws is of specific concern to the FDIC, the federal regulatory agency charged with examining and regulating such federally insured banks. However, it is also equally the concern of the state bank commissioner. See, K.S.A. 9-1701 et seq.

The difficulty, and flaw if you will, inuring in Ms. Crandon's claim of protection from termination for such act(s) of communication rests in two undisputed factual considerations.

First, Ms. Crandon was the attorney for the very agency whose employee was "reported" upon. Everything she knew or learned factually concerning the subject matter of such reporting derived from her position as such agency's attorney. Yet, as the organization's attorney she took no steps to present her concerns to the agency head, Commissioner Dunnick, who had authority clearly to act against his appointee and at will employee, Mrs. Stork. Further, other than by pure supposition from what Ms. Crandon may have been told by examiner Erik Berggren or what she may have heard in the July 6, 1992, civil service hearing, she had no reason to believe, in fact, any proffered counsel and advice by her as general counsel for the agency on the issues raised by the circumstances alleged reported upon would have been rebuffed or neglected, or, if previously considered by Mr. Dunnick, would not be reconsidered by him after hearing her legal advice and opinion. After all, the statutory duty to report a violation of the banking act to the county (or district) attorney was on the commissioner. See, K.S.A. 9-1711. And, Ms. Crandon's duties as general counsel unquestion-

ably included advising the commissioner in regard to his duties. The only "advice" either Mrs. Stork or Mr. Dunnick heard was Ms. Crandon's advocacy at the civil service hearing that Mrs. Stork's circumstances were neither illegal nor inappropriate.

The "Model Rules of Professional Conduct", as modified and adopted under Kansas Supreme Court Rule 226, provide for an attorney's responsibility in such a circumstance as evidenced in this case. The rules and comments, as relevant, and as follows, best speak for themselves:

> **"RULE 1.2 Scope of Representation**
>
> (a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue."
>
> . . .
>
> "(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."
>
> . . .
>
> "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."

"RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with the reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

"RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) to comply with requirements of law or order of any tribunal;"

. . .

"Kansas Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal

and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."

. . .

"The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

. . .

"Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited."

. . .

"Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in para-

graph (b)(1), the lawyer has professional discretion to reveal such information. Where practical, the lawyer should seek to dissuade the client from illegal action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule."

. . .

"The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. . . .

. . .

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer should make inquiry within the organization as indicated in Rule 1.13(b)."

. . .

"RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. *Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.* Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16." (Emphasis supplied.)

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

. . .

"Comment

The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in the Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, the constituents

of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed *by a higher authority in the organization. Clear justification* should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authroity reposes elsewhere; for example, in the independent directors of a corporation. (Emphasis supplied).

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole

may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity or interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case."

. . .

RULE 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

. . .

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client has used the lawyer's services to perpetuate a crime or fraud;
(2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

. . .

(5) other good cause for withdrawal exists.

. . .

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, . . ."

Simply, in other words, if Ms. Crandon's "reporting", including her encouragement to Mr. Berggren to report was, in fact, a report of issues of public concern to an agency with authority to act upon and resolve such issues raised, the steps taken by Ms. Crandon at the time and in the manner taken were clearly contrary to the Model Rules of Professional Conduct noted and did not represent even a modicum of respect for her constituent client, the state bank commissioner, and the interests, authority, duties, and concern of that agency and its officials that would be naturally raised by the subject matter of such a "report".

Further, the record presented is absolutely devoid of any reasonable or plausible justification or excuse for Ms. Crandon's failure, as such attorney, to approach, counsel, and advise her agency head client on the issue, hear his views, or determine, after such consultation, a good faith basis for her to advise him of the necessity for taking action or her intended course of conduct if such action was not taken. Apparently, in Ms. Crandon's mind's eye, Ms. Crandon convicted her organization and its head of complicity or neglect relative to the support defalcations of another employee and took the matter into her own hands, as an individual, rather than as the attorney for the organization and offices involved.

What further clearly appears from the record, or rather lack of record, is that the plaintiff arrived and proceeded on her course of conduct without more than a second hand examination of the facts (except for the referenced mortgage, car title, criminal diversion case, and the disclosure statement) and appears to have, instead of relying on her own independent investigation of the facts and consideration of the law, relied on the opinion of others to categorize the conduct of deputy commissioner Stock as wrongful or unlawful. She appears to have relied on office talk and office politics generated in reference to the Emery civil service hearing's "what's good for the goose is good for the gander" theme and, second hand, to on-goings at the Baileyville State Bank examination. Her statement of what she was told by Mr. Lamberti, counsel for the FDIC, concerning whether the "conduct" reported was unlawful differs from his, however and nevertheless, if in fact she could rely on his opinion to the exclusion of a duty of independent inquiry and decision, she, nevertheless, would have been obligated to report the full facts to Mr. Lamberti. She could not have reported the full facts because she did not know them or never made independent investigation of them. Did she know and report Deputy Commissioner Stork's historic removal from the affairs of the State Bank of Baileyville, prior to Mrs. Stork's testimony under oath? She did not know if, *in fact*, Mrs. Stork had ever examined the Southwest Bank and Trust where her husband's auto loan existed or whether, *in fact*, Mrs. Stork personally had participated in

anyway in the then ongoing examination and review of the State Bank of Baileyville. In fact, and at the time of her termination, the examination of the State Bank of Baileyville was still not final and whether or not Mrs. Stork's relatives had compromised the examination had not been determined at the examiner stage. She did not report, but there is no clear evidence proffered she knew, that Mrs. Stork had closed a checking account with the State Bank of Baileyville, apparently after Mr. Berggren and Mr. Myer, a field examiner, had raised concerns with Mrs. Stork about the propriety of such account, particularly with overdrafts. She did not know that subsequently Mrs. Stork had reported to the bank commissioner concerning Mr. Berggren's concerns. There is no evidence proffered she knew, except from what Mr. Berggren told her or as might have otherwise come out at the civil service hearing, that the bank commissioner had reviewed the situation, however, since she never talked with Mr. Dunnick except as a witness, what, in fact, he considered in such review was otherwise unknown. Thus, from a factual premise Ms. Crandon was proceeding wholly upon supposition or third party opinion only and without any semblance of complete or direct factual information. Further, she knew any conclusions expressed by Mr. Dunnick at the civil service hearing were opinions formed without any advice by her to him to the contrary, as she, not even once, as the agency attorney, discussed the situation with him, as her agency's head or, for that matter, had she ever discussed her beliefs with her apparent designated indictee to be, Mrs. Stork.

Further, indicia of a complete loss of her attorney role and mantle is evidenced by an examination of the alleged "violation" or "conduct" of Mrs. Stork in terms of the law applying to the facts of Mrs. Stork's situation.

Even cursory research would reveal that the principal statute thought to be violated, 18 U.S.C. 213, and which would be of federal concern, was not clearly applicable by authoritative construction. See, *U.S. vs. Napier*, 861 F. 2d 547 (9th Cir. 1988). This latter case, as pointed out by counsel for defendants, is annotated in the USCA edition of the federal code. See, 18 USCA 213, annotations

(5) and (10). Plaintiff has pointed to no cases to the contrary. This fact itself would lend support to Mr. Lamberti's description of his conversation with Ms. Crandon negativing any supposed violations however, considering Ms. Crandon's version as authoritative, still this case could not have been considered by her in reaching any conclusions about the course of conduct she was proceeding on.

Further and clearly, Ms. Crandon's other reference to K.S.A. 9-1701(a) as a statute violated by Mrs. Stork is a statute which substantially mirrors 18 U.S.C. 213 on the point of concern at issue. This statute, as material, and in reference to the point in issue, has historical roots that have been subject to authorative construction since 1921. In the *State, ex rel. v. Wilson*, 108 Kan. 641, 647-648 (1921), the Supreme Court construed the statute and held the state bank commissioner would not be subject to ouster for violation of the statute unless he personally examined a bank or passed on a matter in which he had a financial interest. This case is cited under the revisor of statutes annotation in K.S.A. 75-1301, a statutory section since repealed, but still annotated, referencing the state bank commissioner. Considering this case and the banking statute at issue along with the state's ethics law, K.S.A. 46-247 et seq., and under the facts displayed or at least under the facts known to Ms. Crandon at the time of her reporting, does not compel a different conclusion because a "substantial interest" disclosure had been made and no definitive evidence existed Mrs. Stork passed on or interfered with the ongoing examination of the State Bank of Baileyville which examination was not concluded at the examiner stage at the time of the reporting by Ms. Crandon. This case and the analogous circumstances existing could not, therefore, have been within the contemplation of Ms. Crandon in her manner of proceeding.

Accordingly, as a matter of law, unless Mrs. Stork had in fact proximately examined any bank at which she or her husband had loans, or subsequently and proximately obtained loans, or had interfered in, or aided and abetted in such interference, or passed upon a matter in the examination of such bank on a material matter as Deputy Commissioner, Mrs. Stork's position as Deputy Com-

missioner would not place her in violation of, or within the sanction of, any criminal or ethics statute cited by Ms. Crandon as a basis for her "report". Office scuttlebutt and intrigue should not suffice as a reasonable belief for an attorney to avoid an established manner of proceeding within her own agency or dealing forthrightly with a client. See, 1992 Kan. Ct. R. Annot. 226 at page 243, "Terminology".

Further and clearly, by reference both to Ms. Crandon's testimony, Mr. Lamberti's, and Mr. Berggren's and the lack of proffer of any other testimony, the question of Mrs. Stork's financial interest in the Baileyville bank, given her prior diversion agreement and the prohibition of 12 U.S.C. 1829 barring involvement by such a person with a financial institution is not relevant here because no evidence exists this issue was raised or brought to the attention of any outside person or Mr. Dunnick or was part of any "whistleblowing" or public concern/free speech claim. However, even if it had been, it is equally clear Ms. Crandon never determined whether, in fact, the statute applied to Mrs. Stork because Ms. Crandon did not know by investigation or otherwise, and this record does not disclose, whether the exclusionary premise to application of the statute, FDIC written permission, existed or did not exist as a matter of fact at any time precedent to the circumstances at hand. Further, in this regard, and in reference to 12 U.S.C. 1289 and Mrs. Stork's financial disclosure statement which Ms. Crandon stated she reviewed, it is to be noted Mrs. Stork held stock in a bank holding company whose interest is excluded in defining an "institution affiliated party" under 12 U.S.C. 1289(a)(1)(A)(i). See, 12 U.S.C. 1813(u). Secondly, under section (a)(1)(A)(ii) of 12 U.S.C. 1289, a question is certainly raised whether the phrase "own or control, directly or indirectly, any insured depository institution" would encompass a 4.9% share of stock in a bank holding company that owned such bank or whether the exercise of any such stock ownership rights would fall within the prohibition of 12 U.S.C. 1289(a)(1)(A)(iii)'s "otherwise participate, directly or indirectly in the conduct of the affairs of any insured depository institution". Further, this statute was, as relevant here, amended November 29,

1990, and the preexisting statute only proscribed the circumstances noted under subsection (iii) noted above. It had no provision encompassing a "diversion" as a conviction for the purpose of the statute. Thus, an open question existed whether Mrs. Stork's small and obviously not controlling interest was intended to be included by the changes to this statute. Further, 12 U.S.C. 1289 provided a legal means for avoidance of this prohibition. Further, Mrs. Stork's diversion was entered into March 10, 1982, over ten years before Ms. Crandon's concern, and over eight years before the statute was broadened in scope. (Judicial notice of appearance docket in 82 CR 234 which is the only available document from microfilmed records.) Even if the statute applied to her interest, a substantial question would exist whether the preexisting diversion was disqualifying, at least without notice and opportunity for diversiture. Such a circumstance may have called for wise counsel, but certainly the known facts would not warrant the agency's attorney condemnation and a self-anointed prosecutorial stance without her further legal inquiry and without prior advice to, consultation with, and clear refusal to act by, her constituent clients, particularly in the non-exigent circumstances then existing.

Accordingly, except perhaps for this latter circumstance which is not a part of any claim before the court, all Ms. Crandon's concerns dealt with past conduct of Mrs. Stork or present conduct that Mr. Dunnick, as the agency head and her direct employer, had authority to act upon in the ordinary course of his duties.

Accordingly, if Ms. Crandon blew a whistle, it was a whistle in the wind because it was misdirected. Further, this "whistle" was out of tune and should not command deference in this proceeding as the act of a reasonable attorney because of the lack of independent inquiry as to the facts or the law supporting it and, in fact, an established absence of acts or law to support any substance to the report or "whistleblowing" at the time it was made.

A premise to any whistleblowing claim is that a reasonable person in the shoes of a plaintiff, here an attorney, would believe a violation of law or matter of public concern existed. See, *Palmer v. Brown*, supra, at page 900. Further, the "whistleblowing" must

be made in good faith and not for a corrupt or other specious motive, *id.*

Given plaintiff's status as an attorney, her avoidance of professional duty to her clients, her assumption of agency power and authority to herself, and her rush to judgment on supposition and surmise, should suffice as both lack of good faith and good motive. It postures her claims as ones of casting blame on the mirror for her termination.

In terms of the foundation for the law applying, plaintiff's whistleblowing claims are rationally best tested by the principles of law underlying her First Amendment claim. A First Amendment claim, as well as a whistleblowing claim, arising out of the reporting by an attorney on a client should consider whether the attorney's speech or conduct, subject of the claim, was not only reasonably founded, but appropriately and procedurally necessitous given the existence of the attorney/client relationship. Additionally, if the communication should, because of the omission of duty of the attorney to his client, be considered confidential when uttered, and/or otherwise because of the lack of substance of the communication and/or the lack of consultation with the client, be seen to grossly undermine the working relationship between the client and attorney, then, on balance, first amendment status or whistleblower protection should not attach to the improper utterance. Compare, *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 75 L.Ed. 2d 708 (1983); *Larson v. Ruskowitz*, supra. See also, Milbrath, *The Free Speech Rights of Public Employees: Balancing the Home Field Advantage*, 20 Ida. L. Rev. 703 (1984).

Here, particularly, not only the attorney/client relationship, but the orderly processes of government demanded a concern for the individual office holder constituent clients and the client organization itself, particularly, given the absence of any evidence of the intentional complicity of the agency head, Mr. Dunnick, with the assumed wrongdoing "reported" or some urgency to the need for prompt report. Here, it appears that not only was an attorney/client relationship neglected, but it was wholly abandoned. Here,

not only was Ms. Crandon's governmental authority and position abandoned, but in the manner of doing so, the orderly process of governmental decision making vested by law in the banking commissioner was usurped and assumed and then diverted to "outside authorities" by Ms. Crandon. And, further, such acts of abandonment and usurption by Ms. Crandon appear to have been implemented by her on but the slightest of contemplating and inquiry into either the facts or the law applying.

Were plaintiff not an attorney and/or were plaintiff's opinions not based on confidential information received as the attorney. then perhaps the First Amendment would prevent termination for the disclosure for public discussion of what, under other circumstances, might be considered existing public information because of the public Emery Civil Service hearing or an office policy of sharing bank examination information with the FDIC. See, "Plaintiff's Supplemental Memorandum" filed October 22, 1993. Also, compare, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493-496, 43 L.Ed. 2d 328, 349-380 (1975). However, when the messenger delivering such character of information is a person trained to connect the dots displayed from public information with other facts gained from the position as a lawyer, such messenger would not seem immune from discharge by the client. Such character of "tie-in" information should still fall within principles of confidentiality. See, *Wolfram, Modern Legal Ethis* (1986), Section 6.7.4 at page 302. Also see, generally, *Wolfram*, id., sections 6.7.1-6.7.4. The discharge is permitted for the breach of a duty of confidentiality, loyalty, and destruction of the foundation for a working relationship and not necessarily or correctly based on the particular contents or substance of the message conveyed. Weighing and balancing these conflicting interests is the essence of *Pickering* and *Connick*.

Although an attorney may hold the office of a government attorney and, as such, have theoretically as the ultimate client, the citizenry of the state or public he or she serves, nevertheless, principles of ordered liberty and government coupled with the fact the government attorney is privileged to have access to matters not yet ripe for or completely within the public domain as a necessary

fulfillment of his duty of sound advice in the public interest should require the government attorney, absent clearly necessitous circumstances, to follow, rather than usurp, orderly procedures for processing her opinion. It should not be until such orderly processes have been clearly fulfilled or clearly frustrated of fulfillment and the opinion clearly discarded in favor of some continuing or future clearly unlawful conduct that he or she might be able to advise a non-client of the circumstances subject of the disregarded advice. See, Kan. Ct. R. Annot. 226, MRPC 1.13(b); MRPC 1.6(b)(1); Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, Section 1.13: 301, pages 409-410.2 (1993); 93 Law. Man. on Prof. Conduct (ABA/BNA), 51-63 (7/18/90). Otherwise, the public attorney becomes arbiter of any perceived questionable public decision and by the threat, real or implied, of public exposure may extort adherence to views not held by the client upon matters of public policy entrusted to client by the client's public position. This threat may very well diminish or usurp the assigned duties of the functionaries of government or to a very real extent create a situation whereby, at some point, the advice is no longer sought resulting in the destruction of the very purpose of the public office of attorney because of the loss, by non-use, of this source of very important advice for the honest and efficient administration of government.

Clearly, the balance of concerns, including assigning weight to the ethics of the legal profession, must weigh on the side of the defendants in this case and no justification can be had for protecting plaintiff from consequence for, or compensating plaintiff for, recklessly attempting to instigate what could be characterized, on the then knowable facts and law, as a prosecution without probable cause of, in this case, her own clients. See, *Nelson v. Miller*, 227 Kan. 271, 284-285 (1980).

A passage from *Connick v. Myers* quoted in *Larson v. Ruskowitz*, id., at page 971, applies with full force here, as well:

> "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient

fulfullment of its responsibilities to the public. One hundred years ago, the Court notes the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.' *Ex parte Curtis*, 106 U.S., at 373. AS JUSTICE POWELL explained in his separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974):

"To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.' 461 U.S. at 149-51."

Accordingly, in this case, Ms. Crandon's speech was not free, but rather, at the time made was confidential, or at least subject to client consent, or minimally, subject to prior consultation with the client, and in and of itself by the very act of enunciation, subjected the speaker to the reasonable response of discharge for the very reason stated by Commissioner Dunnick, that is, by proceeding as Ms. Crandon did to take the matter out of the agency, he was embarrassed because the act of communication painted him in a light that he was not in control of or capable of administering the very agency of which he was the duly appointed and lawful head on a matter over which he had clear authority. Given the fact Mr. Dunnick had been tried and convicted of complicity or stupidity by his own attorney without nary a word said or concern raised by his attorney on questionable premises, both factually and legally, how then could the relationship of attorney and client, boss and employee, continue? Simply, it could not.

Even had Ms. Crandon reasonably perceived a problem or potential problem, what exigency or emergency required her to avoid the procedures set forth in Section 1.13(b) of the Model Rules of Professional Conduct adopted under Rule 226 of the Kansas Supreme Court which are, designedly so, aimed at providing counsel where counsel may be sorely needed and whereby the fulfillment of a lawyer's calling *and* the public interest might have yielded a perfect match. See, 1992 Kan. Ct. R. Annot. 226, MRPC 1.13(b); Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 Geo. J. Legal Ethics 535, 548 (Winter 1992).

Even had Ms. Crandon been 100% right in the legal assessments that the law was being violated, how can she be excused from not counseling her clients, particularly Mr. Dunnick, of what she believed the law was and what she believed needed to be done in regard to Mrs. Stork. Even if Mr. Berggren had told her or she knew from the civil service proceeding that Mr. Dunnick had reviewed the manner and found no fault with Mrs. Stork, what reasonable right did she have to believe Mr. Dunnick had made an informed decision on the law applying. Mr. Dunnick is not shown to be an attorney and no evidence exists as to his sophistication in the law. His financial statement shows his background as a country banker. What cause did he have to believe Mrs. Stork was in violation of 18 USC 213 or K.S.A. 9-1701? Was he even aware of the changes in 12 U.S.C. 1289, as noted earlier? Did he know the ramifications? For that matter, did Mrs. Stork recognize and understand the application of 12 USC 1289? Did Mr. Dunnick know all the facts regarding the alleged hostility of Mrs. Stork's relatives to the examiner's inquiries at the Baileyville State Bank? Did Mrs. Stork? Certainly Ms. Crandon did not apprise Mr. Dunnick or Mrs. Stork, yet she apparently assumed Mr. Dunnick complicit, a conspirator, a "good old boy" and rather than counsel him on his duties, she assumed them herself. She presumed Mrs. Stork guilty in the face of Mrs. Stork's under oath denials and Ms. Crandon's own open advocacy at the Emery Civil Service hearing that no laws or ethics were broken or bent. These are not the reasonable acts of an attorney toward her clients. Certainly, Mr. Dunnick could rely

on his attorney to follow the ethics of her own profession. Certainly, in the absence of advice to the contrary, he should be able to rely on his general counsel's public words. Further damaging to any claim of Ms. Crandon, however, is the clear conclusion that must be reached from this record that the facts known to Ms. Crandon or that should have been known to her at the time of her "reporting" did not reasonably, much less, "clearly, [evidence] a violation of law". See, 1992 Kan. Ct. R. Annotated 226, MRPC 1.13(c).

Lawyers occupy a unique position in society. They are required to tread where no others go to advise or defend the most vicious or the most vilified, or occasionally charge and pursue on behalf of a client a popular and/or prestigious individual or institution, not because they believe in the moral superiority of their client or the claim, but because the law loves deterrence of error or upon a finding error or in the face of a claim of error demands full representation to a fair and just legal result. Thus, the service is performed to attempt to assure justice not guarantee a result. The lawyer is not, and can not be, the jury for his client. Moral superiority is only a lawyer's mantle once the lawyer is asked to be an instrument of known or easily knowable error and has acted within his or her legal or moral competence to dissuade the conduct. See, 1992 Kan. Ct. R. Annot. 226, 1,13(b). Therefore, if appropriate at all, an act of moral superiority comes only after the good advice, not before it or as substitute for it.

Though certainly a lawyer in private practice may have the power to disassociate from certain cases and controversies, the government lawyer is generally not so completely privileged. Often, neither the client nor the controversy is substantially within the government lawyer's control. Similarly, an in-house lawyer for any organization finds similar lack of choice. Thus, avoidance, short of career change, is not a tool of these lawyers and, therefore, not only must they be mindful of their duty and function as lawyers, but also mindful of their limitations as lawyers within such organizations. Certainly, some situations will test an organization's attorney and place such attorneys on the horns of a dilemma in choosing between their professional and personal economic well being and

their very duties as lawyers that must set them aside, uniquely, as always an honest source of advice, but never a life raft, in what otherwise might be seen as a sea of skullduggery. It is the skill of the lawyer and the essence of professionalism to make his clients not only hear, but also listen to his or her advice even if the advice sets the lawyer aside as a heretic in the organization or, in the last analysis, cuts his or her own economic throat. It is not the function of a lawyer necessarily to be like or loved, but to be listened to and, at best, the advice respected. Controversy, the life blood of lawyering, rarely creates affection for advice contrary to the cause asserted or love for its messenger notwithstanding the soundness of advice. Nevertheless, it is the lawyer's duty to say what must be said even if the client then reacts against the messenger. Although the courage to speak what must be spoken is necessary for a lawyer, very important corollaries require the sense of when to speak, where to speak, to whom to speak, and what to say. Certainly, a government lawyer may have many competing interests to deal with, but the general commentary as well as the Model Rules of Professional Conduct seem to support the concept of the employing agency as the client while recognizing, nevertheless, lines of authority within it. See, *Hazard & Hodes*, id., Sections 1.13: 100-1.13-500; Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Geo. J. Legal 291 (Fall, 1991). Ms. Crandon's apparent act to assume the mantle of determining the public good or interest by virtue of her position as the agency general counsel has been described by one commentator, in similar circumstances, as a situation in which the government lawyer "is not a lawyer representing a client, but a lawyer representing herself". See, *Cramton*, id., at page 299.

The Model Rules of Professional Conduct were enacted, in part, to aid the lawyer in the course of his or her practice, to foist the lawyer in the right direction and light the way in certain dark corridors where personal, but human concerns, might pull on the path of professionalism. They also protect the lawyer in ambiguous circumstances. Here, had Ms. Crandon followed these rules, she may have been forced, her advice ignored, to take steps which just

might have similarly placed her job in jeopardy. However, her exit would have been on the basis of an act of professionalism, her legal duties fulfilled. Though the Model Rules of Professional Conduct would direct Ms. Crandon to withdraw upon client non-compliance when the conduct advised against is criminal or fraudulent (See, 1992 Kan. Ct. R. Annot. 226, MRPC 1.13(d); MRPC 1.16(a)(4)), nevertheless, had she proceeded as an attorney is required to proceed and had her opinion rested on sound footing, her claim might have some appeal for it might be a rank injustice and a disservice to the law of lawyering and to the public for a government lawyer to be terminated or required to withdraw from her public position for doing a sound and right thing in the public interest. Compare, *Lowrey v. Board of Industrial Insurance Appeals*, 684 P.2d 678 (Wash. 1984); See also, Gillers, *Protecting Lawyers Who Just Say No*, 5 Ga. St. U.L. Rev. 1 (Fall 1988); Corello, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 Colum. L. Rev. 389 (March, 1992); O'Dell, *Retaliatory Discharge: Corporate Counsel in a Catch-22*, 44 Ala. L. Rev. 573 (Winter, 1993); Kim, *In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine*, 67 Wash. L. Rev. 893 (October, 1992); Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action for To Further Professional Responsibility*, 92 Dick. L. Rev. 777 (July, 1988); Moskowitz, *Employment-at-Will & Codes of Ethics: The Professional's Dilemma*, 23 Val. U.L. Rev. 33, 56 (Fall 1988); Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, id.

However, here, is not such a case.

Though certainly the Model Rules of Professional Conduct adopted pursuant to Supreme Court Rule 226 are not, ipso facto, a bar to Ms. Crandon's lawsuit and expressly are declared not to be (See, 1992 Kan. Ct. R. Annot. 226, at page 242), nevertheless, where an attorney's asserted causes of action of whistleblowing and free speech violations necessarily find their genesis in support of public policy and/or rights to speak to matters of public concern, their efficacy necessarily rests in balancing right with responsibility in determining the substance of the claims. As such, the Model

Rules of Professional Conduct, as they guide the advancement of the rule of law, should be given substantial weight in assessing whether the plaintiff's claims are proper instruments to the fulfillment of public policy.

Examination of the cases advanced by both sides in this controversy clearly establish that the wellspring of Ms. Crandon's claims are significantly diminished as instruments of sound public policy because of Ms. Crandon's avoidance of the tenets and procedures of her own profession and the resulting avoidance and disrespect to the governmental authority and responsibility of her clients, not as individuals, but as public office holders. The cases pointed to by her to support her claims relate to plaintiffs who, if successful, were successful because the exercise of their fundamental private rights or opinions or their disclosures were not, when measured and balanced, in real conflict with their public or private employment duties and/or their acts entailed doing what the law reasonably required or permitted of any citizen. Their employment position did not truly impede on their rights asserted as citizens or professionals. See, *Pickering v. Board of Education*, supra; *Kurowski vs. Krajewski*, 848 F.2d 767 (7th Cir. 1988); *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988); *Savage v. Com. of Pennsylvania*, 475 F.Supp. 524 (E.D. Pa. 1979); *Grossman v. Schwarz*, 678 F. Supp. 440 (S.D.N.Y. 1988); *Hirsch v. Green*, 368 F. Supp. 1061 (D.Md. 1973); *Kuchka v. Kile*, 634 F.Supp. 502, 512 (M.D. Pa. 1985); *Young v. Marin County*, 241 Cal. Rtr. 169 (1987).

However, where the right asserted significantly impaired or impeached the public function and/or the working relationship, termination was permitted. See, *Connick v. Myers*, supra; *Montaquila v. St. Cyr*, 433 A.2d 206 (R.I. 1981); *Jafree v. Scott*, 372 F.Supp. 264 (N.D.Ill. E.D. 1974), aff. in part, rev. in part, 519 F.2d 1405 (7th Cir. 1975); *Sprague v. Fitzpatrick*, 546 F.2d 560 (Third Cir. 1976).

As legal commentary, supported by judicial decision has pointed out, certain factors that may arise from the employment relationship tend to weight the balance of the claim of protected speech versus the government interest in favor of the government

employer. See, *Milbrath*, supra, 20 Ida. L. Rev. at pages 712-720; *Pickering v. Board of Education*, supra, 20 L.Ed 2d at page 818, note 3. These factors are expressed as follows:

> "1) The employee's false accusations may be difficult for the employer to counter due to the employee's position and his presumed access to the real facts.
>
> 2) The employer's need to maintain discipline or harmony among co-workers.
>
> 3) The employee's statements may impede the employee's proper performance of his daily duties and the employer's efficiency.
>
> 4) The employee's statements may be so without foundation as to call into question the employee's competency to perform the job.
>
> 5) The employee's position may require confidentiality.
>
> 6) A close and personal working relationship which calls for personal loyalty and confidence may be required between the employee and supervisor."

Milbrath, id., page 712.

Here, Ms. Crandon was not really in the position, at the time in question, to exercise private rights of expression, but rather her claimed right of expression emanated directly from her supposed public duties to provide legal advice in aid of the proper administration of the banking laws. Not only the substance of her asserted expressions, but her ability to make them were gained from the very public position held as general counsel and, as noted, was made not only by abandonment of her public duty of giving advice to Mr. Dunnick her agency head, but may be seen, by its ad hoc, out of school, manner of disclosure, as in controvention of the

promulgated standards of her profession. This assumption of course and conduct on the part of Ms. Crandon was not only disabling to the proper operation of her agency, but fundamentally in avoidance of the official reason for her position as attorney. Coming from the general counsel of the agency her "report" likewise carried the power, prestige, and credibility of that office and implied her agency head constituent client was non-responsive to her concerns. Further, the "report" was almost casual in terms of any studied thought or independent investigation into its validity or legal premise. It naturally impacted concepts of attorney client relationships founded in fidelity, and fourth-rightness, not only by the fact of disclosure, but more importantly, by the fact of disclosure without prior consultation. Certainly, it blindsided Mr. Dunnick and left Mr. Dunnick in a defensive position and one of embarrassment since it was he, not Ms. Crandon, that was appointed by the Governor and confirmed by the State Senate to run this agency.

Without some existing exigency, there is no discernable public policy advanced by permitting a lawyer terminated under such circumstances to advance a private lawsuit based on her own avoidance of public and professional duties, particularly on questionable premises. The procedures established by MRPC 1.13(b) clearly provide an authoritative means in the first instance to focus on the relationship and hopefully avoid unnecessary disruption or misunderstandings. None of the legal commentators noted supra proffer a case that holds, or advocates, that a lawyer *acting in violation* of an ethics code should be protected from discharge. Kansas' adoption of a less stringent test for the subject matter circumstances permitting disclosure than advanced by the original Model Rules of Professional Conduct (See, 1992 Kan. Ct. R. Annot. 226, MRPC 1.13(c); id., 1.6 (b)(1); Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Disclosure*, 1 Geo. J. Legal Ethics 289, 302-306 (Fall 1987) does nothing to alter the procedures to be followed precedent to disclosure. Again, the legal commentators favoring more liberal disclosure duties or that advocate remedies to the disclosing attorney subsequent, do not assail the Rule 1.13(b) procedure, e.g. *Gillers*, both supra. Ms. Crandon's

position, by example, is unlike that evidenced in *Parker v. M & T Chemicals, Inc.*, 566 A.2d 215 (N.J. Super, A.D. 1989), whereby the discharged attorney there permitted to sue, was acting in accordance with the code of ethics. See also, *Mourad v. Automobile Club Ins. Ass'n.*, 465 N.W. 2d 395 (Mich. Ct. App. 1991); *Lowry v. Board of Industrial Insurance Appeals*, supra.

The cases noted by these legal commentators as generating their premise for a change in the law had permitted termination notwithstanding compliance with professional standards or good advice. Compare, *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991); *Nordling v. Northern States Power Co.*, 465 N.W.2d 81 (Minn. App. 1991), rev. on appeal, 478 N.W. 2d 498 (Minn. Ap. Ct. 1991); *Willy v. Coastal Corporation*, 647 F.Supp. 116 (S.D. Tex. 1986), reversed on other grounds, 855 F.2d 1160 (1988); *Herbster v. North American Co.*, 501 N.E.2d 343 (Ill. 1986). Generally see, *Corello*, id., pages 399-400, notes 53-55.

The balancing of Ms. Crandon's interests under the First Amendment when weighed with her non-compliance with the tenets of her profession and the interest of the State of Kansas in properly assuring the fulfillment of the proper duties of the general counsel for the agency as well as the duties of the state bank commissioner to administer his office in the first instance, require Ms. Crandon's claims to be dismissed under the principles of law announced in *Connick v. Myers*, supra, and *Pickering v. Board of Education*, supra.

Mr. Dunnick was well within his discretion to end a public and professional relationship Ms. Crandon had completely and inappropriately destroyed without fear of legal recourse by Ms. Crandon. The fact he was angry, as Ms. Crandon alleges, at the time of his termination of her adds nothing to her claim. His anger would be explicable.

For the above reasons alone, the defendants' motion for summary judgment should be sustained. However, it is further clear that a qualified immunity should attach to the defendants for their actions which plaintiff can not overcome by the facts of record. Objectively, and by virtue of the cases noted, no reasonable agency

head would know termination of his agency's general counsel under these circumstances could or would be clearly constitutionally proscribed by any preexisting declaration of law. See, *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed. 2d 572 (1982).

As such, the defendants have established a good faith immunity from the consequences of this discretionary act under a 42 U.S.C. 1983 claim.

Further, the state of Kansas and the State Banking Board and the state bank commissioner, as state officials, would have been, but for their qualified immunity, immune from damages under 42 U.S.C. 1983 except for prospective relief arising as a result of an order of reinstatement including attorney's fees. See, *Pulliam v. Allen*, 466 U.S. 522, 80 L.Ed. 2d 565 (1984); *Missouri v. Jenkins*, 491 U.S. 274, 105 L.Ed. 2d 229 (1989); *Will v. Michigan Dept. of State Police*, 429 U.S. 58, 105 L.Ed. 2d 45 (1989). Even were plaintiff to have been successful, reinstatement would seem a particularly inappropriate remedy to the efficient administration of this government agency with Mr. Dunnick as its head.

Clearly, here, as well, the State Banking Board has been shown to have no authority whatsoever over plaintiff's termination or the State Bank Commissioner's exercise of authority in this regard. Thus, the State Banking Board, improperly captioned as the State Banking Commission, should be dismissed as a defendant for plaintiff's failure to establish any claim against this named defendant whatsoever. (See, this Opinion, supra, at page 12.)

Further, the provisions of K.S.A. 75-2973, the state employee "whistleblower" statute, do not negate the considerations heretofore stated and provide Ms. Crandon with a cause of action. Although the statute specifically prohibits a reporting to any supervisor as a precondition for suit under this statute (See, K.S.A. 75-2973(b)(2)), nevertheless, no reasonable attorney employee, standing in plaintiff's shoes as general counsel, could perceive the conduct of the defendants as a basis for any out of agency report at the time it was made. In other words, plaintiff reasonably had then no whistle to blow and, in fact, recklessly abandoned her duties as general counsel and disclosed information which a reason-

head would know termination of his agency's general counsel under these circumstances could or would be clearly constitutionally proscribed by any preexisting declaration of law. See, *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed. 2d 572 (1982).

As such, the defendants have established a good faith immunity from the consequences of this discretionary act under a 42 U.S.C. 1983 claim.

Further, the state of Kansas and the State Banking Board and the state bank commissioner, as state officials, would have been, but for their qualified immunity, immune from damages under 42 U.S.C. 1983 except for prospective relief arising as a result of an order of reinstatement including attorney's fees. See, *Pulliam v. Allen*, 466 U.S. 522, 80 L.Ed. 2d 565 (1984); *Missouri v. Jenkins*, 491 U.S. 274, 105 L.Ed. 2d 229 (1989); *Will v. Michigan Dept. of State Police*, 429 U.S. 58, 105 L.Ed. 2d 45 (1989). Even were plaintiff to have been successful, reinstatement would seem a particularly inappropriate remedy to the efficient administration of this government agency with Mr. Dunnick as its head.

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able attorney plaintiff in Ms. Crandon's shoes, both factually and legally, would have had no basis to then credit (K.S.A. 75-2973(c)(4)(A)) and/or she otherwise disclosed information which was at the time of the "report" confidential pursuant to 1.6(a) and 1.13(b) of the Model Rules of Professional Conduct as reflected by Supreme Court Rule 226. Accordingly, until the procedures and circumstances required by Rule 226 were otherwise exhausted or shown to be ineffectual or otherwise inapplicable, Ms. Crandon, as general counsel, certainly had neither duty nor privilege to disclose. Likewise, the information gained principally from her role of general counsel emanated, in part, from a bank examination and was confidential without the commissioner's approval. See, K.S.A. 9-1712. In either case, no grounds to excuse the duty of confidentiality exist because plaintiff took no steps a person, particularly, an attorney, must take to make such disclosures proper nor did exigent circumstances exist that might be seen to excuse such preconditions to a confidentiality waiver for such a character of reporting.

Although at least one commentator has questioned whether under the comparable federal whistleblower act, the Model Rules of Professional Conduct's confidentiality rules would suffice to meet that act's exemption for disclosures of information "prohibited by law" (See, *Cramton*, supra, 5 Geo. J. L. Ethics, at pages 307-315), it would appear in Kansas that Rule 226 of the Kansas Supreme Court, adopting, as modified, the Model Rules of Professional Conduct would have the force and effect of law. See, K.S.A. 7-103; K.S.A. 7-111; *State v. Schumacher*, 210 Kan. 377, 382 (1972). Also compare, *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, 559 (1979). Therefore, the phrase in K.S.A. 75-2973(c)(4)(C) "is confidential under any other provision of law" should reasonably encompass the confidentiality requirements and procedures of the Model Rules of Professional Conduct adopted by Kansas Supreme Court Rule 226 and as herein noted.

Likewise, since at least the confirming source of at least some of Mrs. Stork's loans (overdrafts) derived from the examination of a state chartered bank, this information remained confidential without the bank commissioner's approval. See, K.S.A. 9-1712. As

such, it would be material not subject to the Kansas Open Records Act and thus its disclosure would not permit a suit based thereon under K.S.A. 75-2973. See, K.S.A. 45-221(a)(1); K.S.A. 75-2973(c)(4)(B).

Further, by enactment of K.S.A. 75-2973, the legislature has sufficiently defined the parameters of a state employee whistleblower's remedy beyond which no state common law derived cause of action would probably lie. Comparably, *Polson v. Davis*, 895 F.2d 705 (10th Cir. 1990).

Finally, in conclusion, the court would note that the necessity of treating Ms. Crandon's conversations or sponsored conversations with the FDIC as a report (by Ms. Crandon's adament assertion of intent to report) perhaps paints Ms. Crandon's actions as more aggressively intended than perhaps the reality was, however, any scenario less whereby her "report" was not intended as a "report" in the whistleblowing sense eliminates any specie of claim by her whatsoever. If as plaintiff argues, the subject matter of the "report" was a matter of public record and not confidential and such reporting was a matter of common office practice, then a "report" and the "public concern" speech or whistleblowing aspect of plaintiff's claims similarly disappear. Under this set of facts representing lesser scenarios than here assessed, the issue then raised by her termination becomes purely one of not following office protocol by not informing Mr. Dunnick first and for which act Mr. Dunnick had clear authority to fire Ms. Crandon for this deviation, real or perceived, actual or mistaken, fairly or unfairly, since Ms. Crandon was an "at will" employee in the state unclassified service.

ENTRY OF JUDGMENT

For the reasons stated in the above Memorandum Opinion, judgment is entered for each of the above defendants and against the plaintiff on all of plaintiff's claims. Costs are taxed to the plaintiff.

This entry of judgment shall constitute the Court's entry of judgment when filed with the Clerk of this Court and no further journal entry is required.

SO ORDERED, this 27th day of December, 1993.

/s/_____
Franklin R. Theis
District Judge